(3)

No. 84-743

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BETTY A. ROSEN,

Petitioner,

v.

CHRYSLER PLASTIC PRODUCTS CORPORATION, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

RESPONDENT CHRYSLER PLASTIC PRODUCTS CORPORATION'S BRIEF IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

As viewed by respondent Chrysler Plastic Products Corporation, the instant petition presents the following questions:

1. Whether variances in wages which are the result of "... a differential based on any other factor other than sex ..." are permissible under Title VII.

2. Whether either a district court or an appeals court is required to presume that a Title VII defendant acts unlawfully.

3. Whether after a district court has rendered an error-free decision against a claimless Title VII plaintiff and an appeals court has correctly affirmed that decision, this Court should be persuaded by unsupported and unsupportable arguments to permit review of those decisions.

PARTIES

The petitioner is Betty A. Rosen (herein either "petitioner" or "Ms. Rosen"). Ms. Rosen was the plaintiff in the district court and the appellant in the Sixth Circuit.

The respondents are Chrysler Plastic Products Corporation (herein either "respondent Chrysler" or "Chrysler"), petitioner's employer, and the United Auto Workers Local 1879 (herein either "respondent Union" or "Union"), petitioner's union. Chrysler and the Union were the defendants in the district court and the appellees in the Sixth Circuit.

Respondent Chrysler, a wholly-owned subsidiary of Chrysler Corporation, filed a disclosure of corporate affiliations and financial interest dated May 25, 1983, with the Sixth Circuit.

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OPINIONS BELOW

The opinion of the United States District Court for the Northern District of Ohio, Western Division, has not been reported and is printed as Appendix A to the petition. The opinion of the United States Court of Appeals for the Sixth Circuit has not been reported and is printed as Appendix B to the petition. The Sixth Circuit's affirmance of the district court's decision is noted under "decisions without published opinions" at 742 F.2d 1457.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Equal Pay Act of 1963, 29 *U.S.C.A.* §§ 206(d)(1) and (2) (herein "Equal Pay Act"), and of Title VII of the Civil Rights Act of 1964, as amended, 42 *U.S.C.A.* §§ 2000e *et seq.* (herein "Title VII"), are reproduced in the petition, pp. 7-10.

Some pertinent portions of the regulations with respect to the Equal Pay Act are reproduced in the petition, pp. 10-13, but 29 *C.F.R.* § 800.147 does not appear to be pertinent here. In addition, 29 *C.F.R.* § 800.141, which is cited in the petition, p. 16, is not reproduced.

STATEMENT OF THE CASE

The instant action involves averred sexual discrimination in employment in claimed violation of Title VII. Petitioner's action is supported by neither the facts nor the law.

In order to place the questions presented for review in proper perspective, it is necessary to review some facts from many years ago. Unfortunately, since petitioner's supposed statement of the case in her petition is so distorted and misleading, this statement, for this additional reason, is longer than what is normally to be preferred. For the Court's convenience, the facts covering this lengthy time span will generally be summarized in their approximate chronological order.

Since on or about August 9, 1968, respondent Chrysler has been engaged in manufacturing in Erie County, Ohio. Its facilities at said location are commonly referred to as the Sandusky Plant (herein "Sandusky Plant").

On or about August 9, 1968, the Sandusky Plant was purchased from the Air Reduction Company (herein "Airco"). Ms. Rosen and one Gary B. Dunn (herein "Mr. Dunn") had been employees of Airco, and they thereafter became employees of respondent Chrysler.

After the purchase of Airco in 1968, and after respondent Chrysler began to manufacture at the Sandusky Plant, evaluations and reclassifications of all jobs were begun. In doing so, and after subsequent changes in work content of some jobs, respondent Chrysler also began to discover that some employees were paid and classified in higher graded classifications while performing the tasks of lower graded classifications.

In 1973, the first year for which Ms. Rosen is attempting to assert a claim for wages, she was in the classification of "Technician-Test & Analysis" at grade "7", and Mr. Dunn was in the classification of "Illustrator-Graphic B" at grade

"9". At that time, respondent Chrysler had an equal employment opportunity policy and also had a sex-neutral salary structure. As to this approximate time period, Ms. Rosen has also admitted that she was then doing "... color matching ..." and that Mr. Dunn was working "... on the drawing board...."

On or about January 2, 1974, the National Labor Relations Board (herein "NLRB") issued a "certification of representative" for a salaried collective bargaining unit of certain salaried employees at the Sandusky Plant. Ms. Rosen and Mr. Dunn were, and are, employees within said unit, and respondent Union became, and is, their collective bargaining agent.

During 1974, collective bargaining negotiations began for the first collective bargaining agreement between respondent Union and respondent Chrysler.

In these initial negotiations, respondent Union proposed, and respondent Chrysler later agreed, that any employee, whether male or female, who was determined to be receiving an inappropriately high rate of pay as a result of overclassification should be "red circled" so that such an employee, whether male or female, would not take a pay reduction. It was later determined that thirteen employees should be so "red circled." Of such thirteen employees, ten happened to be male, one of whom was Mr. Dunn, and three happened to be female.

Later in 1974, the first collective bargaining agreement between respondent Union and respondent Chrysler was negotiated. It was dated December 9, 1974, and its approximate three-year term, subject to its other provisions, extended until November 23, 1977 (herein "1974-1977 Agreement").

Under the 1974-1977 Agreement, the pay of an employee was basically determined by classification, grade, and corresponding salary range. Variances between salaries of

employees performing the same work were normal and natural occurrences due to the fact that each classification had a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases. Such variances occurred as a result of factors other than sex. In addition, the 1974-1977 Agreement also contained so-called "lower grade" provisions, which were sex-neutral provisions to protect employees, both male employees and female employees, from wage reductions in certain situations, such as that presented here. (As will also be noted below, subsequent collective bargaining agreements have also contained similar sex-neutral provisions.)

During the term of the 1974-1977 Agreement, several other activities occurred which perhaps should also be briefly noted here. Such activities are so noted merely in the interests of presenting a more complete review of the facts, and they are not decisive for present purposes.

First, on or about September 15, 1975, Ms. Rosen filed a grievance with respect to the pay differential between her and Mr. Dunn, which resulted in a no liability resolution on or about June 17, 1976.

Second, on or about September 24, 1975, plaintiff filed a discrimination charge with the Equal Employment Opportunity Commission (herein "EEOC") against respondent Chrysler and respondent Union with respect to said pay differential, which resulted in the EEOC's issuance of a "notice of right to sue" on or about January 25, 1979.

Third, on or about August 31, 1976, plaintiff filed a discrimination charge affidavit with the Ohio Civil Rights Commission (herein "OCRC") against respondent Chrysler (and against respondent Union) with respect to said pay differential, which resulted in the OCRC's issuance of a ". . . NO PROBABLE CAUSE . . ." letter on or about June 7, 1977.

In 1977, the second collective bargaining agreement between respondent Union and respondent Chrysler was negotiated. It was dated December 8, 1977, and its approximate three-year term, subject to its other provisions, extended until November 23, 1980 (herein "1977-1980 Agreement").

On December 19, 1977, and also as a result of the 1977 negotiations, Ms. Rosen was changed from the classification of "Technician-Test & Analysis" at grade "7" to the new classification of "Color Specialist-Styling" at grade "8", and Mr. Dunn was changed from the classification of "Illustrator-Graphic B" at grade "9" to the new classification of "Color Specialist-Styling" at grade "8", which were the same classification and same grade as petitioner's were. At that time, Ms. Rosen's rate was increased from $266.90 to $273.95, and Mr. Dunn's rate, which was not changed, remained at $290.83.

In 1980, the third collective bargaining agreement between respondent Union and respondent Chrysler was negotiated. It was dated October 16, 1980, and its approximate three-year term, subject to its other provisions, extended until November 23, 1983 (herein "1980-1983 Agreement").

Under each of the above-noted three collective bargaining agreements, the pay of an employee was basically determined by classification, grade, and corresponding salary range. Variances between salaries of employees performing the same work were normal and natural occurrences due to the fact that each classification had a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases, and such variances occurred as a result of factors other than sex. Each of these three collective bargaining agreements also contained sex-neutral provisions to protect employees, both male employees and female employees, from wage reductions in situations such

as that presented here. In addition, the wages of both male employees and female employees were protected from wage reductions as a result of such sex-neutral provisions during the term of each such agreement.

As demonstrated in the prior proceedings, and contrary to the mistaken wailing in the petition, at p. 20, under the sex-neutral wage structures and related provisions which have been, and presently are, in effect for employees such as Ms. Rosen and Mr. Dunn, wage differentials for different individuals with the same classification and the same grade cease when such individuals reach the maximum rate for the applicable classification and grade. At this time, however, neither Ms. Rosen nor Mr. Dunn has yet reached the maximum rate for grade "8".

On or about February 16, 1979, Ms. Rosen commenced the instant action by the filing of a complaint against respondent Chrysler and respondent Union. In her complaint, Ms. Rosen averred that she has been, and is being, paid less than Mr. Dunn. In doing so, she also attempted to assert that such wage differentials were a result of unlawful sex discrimination by respondent Chrysler and respondent Union in violation of Title VII.

Each respondent thereafter filed an answer to the complaint; each of such answers included a defense in the nature of a general denial and other defenses. Later, discovery was also undertaken by each party.

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, each respondent subsequently filed a motion for summary judgment, a supporting brief, and a supporting affidavit. (Fed. Rules Civ. Pro. Rule 56, 28 *U.S.C.A.*) Both motions were based on the statutory premise that "... a differential [in wages] based on any other factor than sex ...", even when substantially equal work is involved, is lawful. (29 *U.S.C.A.* § 206(d)(1).)

In addition, petitioner also later filed a motion for summary judgment, but "... at oral argument [on November 29, 1982, she] ... conceded ... [that her motion was precluded by the factual question as to whether she and Mr. Dunn performed equal work within the permissible time period under Title VII and] requested that the Court consider her motion as one for partial summary judgment as to the issue of whether the 'red-circling' in this instance is based on sex or is sexually discriminatory in impact." Respondent Chrysler also submitted a brief and three affidavits in opposition to plaintiff's motion for summary judgment, and respondent Union also submitted a similar brief and affidavit.

On March 28, 1983, the district court filed an opinion and order and also an accompanying judgment denying petitioner's motion for summary judgment, granting the respondents' separate motions for summary judgment, and dismissing petitioner's complaint.

In the opinion and order filed on March 28, 1983, the district court began its summation of the above-noted material facts with this telling sentence:

> "The following relevant facts are *undisputed*. ..." (Emphasis added. Opinion and Order, p. 1 (Petition, p. 26).)

The district court, after reviewing the facts, properly determined:

> "The Court finds that the wage differential between the plaintiff and Mr. Dunn as of May, 1973, was due to a factor other than sex. It is *undisputed* that until sometime in 1971 Mr. Dunn worked on the drawing board, a task that the plaintiff never performed. It is also *undisputed* that at least until May, 1973, Mr. Dunn performed some work on the drawing board, as well as other tasks, which the plaintiff did not do. Because Mr. Dunn performed these tasks he was classified in a job title which put him in a higher salary grade than the plaintiff. Therefore, as of May, 1973,

Mr. Dunn's salary was higher than the plaintiff's due to factors other than sex.

* * *

"The Court finds that the 'red-circle' provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. . . .

* * *

". . . Due to the sex-neutral lower grade provisions of the collective bargaining agreement, Mr. Dunn retained his old wage rate. . . .

* * *

"Therefore, the Court finds that at all times relevant the difference in wages between the plaintiff and Mr. Dunn was due to factors other than sex. . . ."
(Emphasis added. Opinion and Order, pp. 9-10 (Petition, pp. 46-47, 48-49, 50, 51).)

On April 14, 1983, plaintiff filed a notice of appeal to the Sixth Circuit. Extensive briefs were then filed with the Sixth Circuit, and oral arguments were thereafter heard by the Sixth Circuit. On August 8, 1984, the Sixth Circuit, by a *per curiam* opinion, affirmed the district court's judgment.

". . . The trial court . . . ruled that the plaintiff and her male counterpart were performing different duties at least until 1974 or 1975 and thus the initial wage differential was due to a factor other than sex. . . .

". . . [In 1974] Chrysler and the Union agreed to 'red-circle' these [thirteen misclassified] employees and pay them at their former higher salary for as long as they remained on the job. It was also agreed, however, that once these thirteen employees left the job, their replacements would be assigned the appropriate classification and salary grade. . . . [T]he trial court concluded that at all relevant times the difference in wages paid the plaintiff and her male counterpart was due to factors other than sex. . . .

> "Given the thorough and thoughtful opinion prepared by Judge Potter, we adopt the findings and conclusions of that opinion. . . ."
> (*Per Curiam* Opinion, pp. 1-2 (Petition, pp. 55-57).)

On November 6, 1984, the instant petition for certiorari was served upon respondent Chrysler. On its face, the petition shows no good reason for this Court to review the decision of the Sixth Circuit. Review by this Court is neither warranted nor appropriate.

SUMMARY OF ARGUMENT

In the instant action, the decisive facts are either admitted by petitioner or are not disputed (or cannot be disputed) by petitioner. The applications of the law by both the district court and the Sixth Circuit to those facts were correct. Petitioner has completely and totally failed to establish that there has been unlawful discrimination "... because of ... sex ..." as to her. (42 *U.S.C.A.* § 2000e-2(a).) In so failing, petitioner has already taken more than her share of the resources and energies of the judicial system and her opposing litigants. As matters of both fact and law, as both the district court and the Sixth Circuit have properly so determined, there has been no such unlawful discrimination "... because of... sex ..." as to petitioner. (42 *U.S.C.A.* § 2000e-2(a).)

In addition, respondents also established beyond cavil that the differential in wages between petitioner and Mr. Dunn was lawful at all relevant times. Variances in wages which are the result of "... a differential based on any other factor other than sex ..." are permissible under Title VII. (29 *U.S.C.A.* § 206(d)(l).) The variances between the wages paid to petitioner and the wages paid to Mr. Dunn were the result of such permissible differentials based on factors other than sex. (42 *U.S.C.A.* § 2000e-2(h).)

The "red circling" and "lower grade" provisions utilized by respondents here are widely used throughout industry

by employers and unions, and their utilization was proper here. Neither the district court nor the appeals court was required to presume that the respondents acted unlawfully, and it was also established that they did not do so.

The decisions by both the district court and the Sixth Circuit were correct. Under all of the circumstances present here, such decisions were virtually compelled, and further review of those decisions is neither warranted nor appropriate. Further review should now be declined by this Court.

ARGUMENT—REASONS FOR DENYING THE PETITION

The petition reveals upon its face, p.14, a scope limited to the disgruntlement of one woman at the compared remuneration of one man. If this Court is to undertake review of every pique of an employee toward a fellow employee under circumstances such as those present here, many widespread legal problems must be ignored.

Here, the circumstances were carefully considered and determined by both the district court and the appellate court. The petition does not even attempt to assert the more or less traditional grounds for seeking review. This is not particularly surprising since an attempt to have done so would only have further demonstrated why review is neither warranted nor appropriate here. No basis for error or conflicts between appellate courts has been suggested. This is simply not the type of case that demands or requires this Court's precious time. For the additional reasons set forth below, the petition should be denied.

I. VARIANCES IN WAGES WHICH ARE THE RESULT OF "... A DIFFERENTIAL BASED ON ANY OTHER FACTOR OTHER THAN SEX ..." ARE PERMISSIBLE UNDER TITLE VII.

Title VII makes it an unlawful employment practice for an employer

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, *sex*, or national origin; . . . ."
>
> (Emphasis added. 42 *U.S.C.A.* § 2000e-2(a).)

The last sentence of Section 703(h) of Title VII, known as the Bennett Amendment, further provides as follows:

> ". . . It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29."
>
> (42 *U.S.C.A.* § 2000e-2(h).)

In *County of Washington v. Gunther*, 452 U.S. 161 (1981), the Supreme Court held that the Bennett Amendment incorporates the four affirmative defenses of the Equal Pay Act, 29 *U.S.C.A.* § 206(d)(1)(i)-(iv), into Title VII for sex-based wage discrimination claims.

The Equal Pay Act provides in most pertinent part as follows:

> "(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees *on the basis of sex* by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, *except where such payment is made pursuant to* (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) *a differential based on any other factor other than sex: Provided*, That an employer who is paying a

> wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."
>
> (Emphasis in original; selective emphasis added. 29 *U.S.C.A.* § 206(d)(1).)

Thus, the Equal Pay Act establishes three specific exclusions and one broad general exclusion as affirmative defenses to claims of sex-based wage discrimination. The House Committee on Education and Labor, which considered the Equal Pay Act, explained the purpose of these exclusions as follows:

> "... It is the intent of this committee that any discrimination based upon any of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, *the broad general exclusion has been also included.*"
>
> (Emphasis added. H.R.Rep. No. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 *U.S. Code Cong. & Ad. News* 687, at p. 689.)

In *County of Washington v. Gunther*, 452 U.S. 161, 171 (1981), this Court, in reviewing the legislative history as to the fourth exclusion, stated:

> "... Representative Griffin, for example, explained that the fourth affirmative defense is *a 'broad principle,'* which 'makes clear and explicitly states that a differential based on any factor or factors other than sex would not violate that legislation.' 109 Cong. Rec. 9203 (1963). See also *id.*, at 9196 (remarks of Rep. Frelinghuysen); *id.*, at 9197-9198 (remarks of Rep. Griffin); *ibid.*, (remarks of Rep. Thompson); *id.*, at 9198 (remarks of Rep. Goodell); *id.*, at 9202 (remarks of Rep. Kelly); *id.*, at 9209 (remarks of Rep. Goodell); *id.*, at 9217 (remarks of Reps. Pucinski and Thompson)."
>
> (Selective emphasis added.)

Variances in the payment of wages to employees of the opposite sex for "... equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions ..." are permissible provided such variances in payment are

made pursuant to one of the four exclusions authorized by the Equal Pay Act.

The fourth exclusion is fully applicable here, and it permits variances in payment made pursuant to "... a differential based on any other factor other than sex. ..." (29 *U.S.C.A.* § 206(d)(1).) As demonstrated to both the district court and the Sixth Circuit, such unequal payments made pursuant to "... a differential based on any other factor other than sex ..." have been upheld in a wide variety of cases. For examples, see: *Salazar v. Marathon Oil Co.*, 502 F. Supp. 631 (S.D. Tex. 1980), where the court held that longevity of service is a permissible factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *EEOC v. Cleveland State Univ.*, 28 FEP Cases 1782 (N.D. E.D. Ohio 1982), where the court held that a seniority system is a factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Equal Employment, Etc. v. Aetna Ins. Co.*, 616 F. 2d 719 (4th Cir. 1980), where the Fourth Circuit held that the existence of two distinct salary programs, neither of which had sex discrimination as a purpose or an effect, is a factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Strecker v. Grand Forks County Social Service Board*, 640 F. 2d 96 (8th Cir. 1981), where the Eighth Circuit held that the existence of the state personnel classification system which limited the plaintiff's salary level is a permissible factor other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Piva v. Xerox Corporation*, 654 F. 2d 591 (9th Cir. 1981), where the Ninth Circuit held that education, training, and experience are permissible factors other than sex upon which wage differentials may be based without violating the Equal Pay Act; *Trent v. Adria Labs.*, 28 FEP Cases 353 (N.D. Ga. 1982), where the court held that prior experience was a permissible factor other than sex upon which wage differentials may be based without violating

the Equal Pay Act; *Kouba v. Allstate Ins. Co.*, 691 F. 2d 873, 876-877 (9th Cir. 1982), where the Ninth Circuit stated that "... the Equal Pay Act entrusts employers, not judges, with making the often uncertain decision of how to accomplish business objectives ... [and] Congress did not limit the exception to job-evaluation systems ... [and] instead, it excepted 'any other factor other than sex' and thus created a 'broad general exception'..."; *Hein v. Oregon College of Educ.*, 718 F. 2d 910, 921 (9th Cir. 1983), where the Ninth Circuit stated that "... the court should be slow to reject OCE's defense unless it determines that OCE's justifications do not reasonably explain the differences in starting salaries ..."; *Winkes v. Brown University*, —F. 2d—(1st Cir. 1984) (36 FEP Cases 120, 121), where the First Circuit stated that the meeting of a competitive offer fell within "... the general one [exception], a differential based on any other factor other than sex...."

The Third Circuit analyzed at length the "... any other factor other than sex ..." exception in *Hodgson v. Robert Hall Clothes, Inc.*, 473 F. 2d 589 (3d Cir. 1973), *cert. denied*, 414 U.S. 866 (1973). There, the Third Circuit held that, where the defendant's men's department was more profitable than its women's department, the difference in profitability of the two departments justified differentials in base salary paid to employees in the two departments, regardless of individual performances of the individual employees in the two departments. In so holding, the Third Circuit reviewed at length the legislative history of the Equal Pay Act and stated in part:

> "In providing for exceptions, the statute states that they will apply when the males and females are doing equal work. Congress thus intended to allow wage differentials even though the contrasted employees were performing equal work...."
> (473 F. 2d 589, at p. 594.)
>
> "Representative Goodell, a key sponsor of the Act, said:

'. . . [T]here are many factors that can be taken into consideration in working out differentials of pay among employees . . . which would be proper under this legislation so long as they were based on those factors and not on the basis of whether employees are women or men.' 109 Cong.Rec. 9206.

* * *

'If he [the employer] has a reasonable standard of differentiation, the Labor Department is not to come in, even, and judge the reasonableness or unreasonableness of this differentiation among employees, except as it shows a clear pattern of discrimination against sex.' 109 Cong.Rec. 9208 (1963).

Rep. Griffin stated:

'I should like to focus the attention of the gentlemen upon roman numeral iv, at the top of page 3 which makes clear and explicitly states that a *differential based on any factor or factors other than sex would not violate this legislation. In other words, even though jobs involve the same skill, equal effort, equal responsibility, and are performed under the same working conditions, if there is any other factor not based on sex upon which a differential is based, then no violation of this law can be found.* Roman numeral iv is a broad principle, and those preceding it are really examples: such factors as a seniority system, a merit system, or a system which measures earnings on the basis of quality or quantity of production. The other body saw fit to leave out references in the bill to a merit system, a system which measures on the basis of quality and quantity, and a seniority system, and included only the broad language found in roman numeral iv of our bill. However, it should be clear that under either bill a wage differential based upon any factor other than sex is not a violation.' 109 Cong.Rec. 9203 (1963) (Rep. Griffin, R., Mich.) (emphasis supplied)

And the House Committee report stated:

'Three specific exceptions and one broad general exception are also listed. It is the intent of this committee that any discrimination based upon any

> of these exceptions shall be exempted from the operation of this statute. As it is impossible to list each and every exception, the broad general exclusion has been also included.' H. Rept. 309, 88th Cong., 1st Sess. U.S.Code Cong. and Adm. News, p. 689 (1963)."
>
> (Emphasis in original. 473 F. 2d 589, at pp. 595-596.)
>
> "... [T]he legislative history set forth above indicates a Congressional intent to allow reasonable business judgments to *stand*. ... Robert Hall's method of determining salaries does not show the 'clear pattern of discrimination,' (Rep. Goodell, 109 Cong. Rec. 9203), that would be necessary for us to make it correlate more precisely the salary of each of its employees to the economic benefit which it receives from them. ..."
>
> (Emphasis added. 473 F. 2d 589, at p. 597.)

As noted above, this Court denied review.

Here, too, there is, and can be, no such showing of a "...'clear pattern of discrimination'...", and the "... reasonable business judgments ..." of the respondent Union and the respondent Company in protecting the wages of both female employees and male employees in a sex-neutral manner in the applicable situations should "... stand. ..."

Initial variances in wages paid petitioner and fellow employee Mr. Dunn were the result of a factor other than sex. Mr. Dunn is one of the employees who was "red circled" in 1974, when the first collective bargaining agreement was entered into between respondent Chrysler and respondent Union. The policy under which Mr. Dunn was "red circled" was sex-neutral. Under said policy, thirteen employees, including Mr. Dunn, were "red circled". Of those thirteen employees, ten happened to be men and three happened to be women.

The principle of "red circling" has long been recognized as a permissible "... differential based on any other factor other than sex. ..." The principle of "red circling" was

recognized by the House Committee on Education and Labor, which stated at the time the Equal Pay Act was passed, that the fourth exclusion for a factor other than sex was meant to encompass, among other things, the following:

> "... This term [red circle rates] is borrowed from War Labor Board parlance and describes certain unusual, higher than normal wage rates which are maintained *for many valid reasons.* For instance, it is not uncommon for an employer who must reduce help in a skilled job to transfer employees to other less demanding jobs but to continue to pay them a premium rate in order to have them available when they are again needed for their former jobs."
>
> (Emphasis added. H.R.Rep. No. 309, 88th Cong., 1st Sess. (1963), *reprinted in* 1963 (*U.S. Code Cong. & Ad. News 687, at p. 689).)*

The principle of "red circling" is also recognized in the regulations promulgated by the Department of Labor wherein it is stated:

> "The term 'red circle' rates describes certain unusual, higher than normal, wage rates which are maintained *for many reasons.* An example of the use of a 'red circle' rate might arise in a situation where a company wishes to transfer a long-service male employee, who can no longer perform his regular job because of ill health, to different work which is now being performed by women. Under the 'red circle' principle the employer may continue to pay the male employee his present salary, which is greater than that paid to the women employees for the work both will be doing. Under such circumstances, maintaining an employee's established wage rate, despite a reassignment to a less demanding job is a valid reason for the differential even though other employees performing the less demanding work would be paid at a lower rate, since the differential is based on a factor other than sex."
>
> (Emphasis added. Equal Pay for Equal Work under the Fair Labor Standards Act, 29 *C.F.R.* § 800.146 (1981).)

The principle of "red circling" has also been recognized by the courts as a permissible factor other than sex. In

Marshall v. J. L. Hudson Co., 25 FEP Cases 1101 (E.D. Mich. 1979), the court explained the principle of "red circling" at p. 1106:

> "The 'red circle' principle operates to permit, in extraordinary instances and on an *ad hoc* basis, the maintaining of disparate wage-rates with respect to workers of different sexes performing essentially equal work, *notwithstanding the proscriptions contained in the Act*.... 'Red circling' has yet to be defined in all its manifestations; *the flexibility of the concept has been preserved* by anticipation of the particular needs that may arise in attempting to reconcile legitimate business necessities with the dictates of the Act...."
> (Selective emphasis added.)

"Red circling" remarkably similar to that agreed to by respondent Chrysler with respondent Union was also upheld by the court in *Mangiapane v. Adams*, 20 FEP Cases 699 (D. D.C. 1979). In that case, plaintiff brought an action asserting a violation of the Equal Pay Act based upon the admitted fact that a male program analyst in the same division of the Federal Aviation Administration was being paid at a higher rate even though his position and plaintiff's both required substantially equal skill, effort, and responsibility, and were both performed under similar conditions. Defendants averred that the salary differential was based upon a factor other than sex—a reorganization which called for the "red circling" of then current GS-13 program analyst positions and the filling of those positions as they were vacated with GS-12 program analysts. The court held that such "red circling" was permissible because it perpetuated no prior unlawful bias and stated at p. 701:

> "... The agency [the FAA] merely sought to mitigate the impact of a potentially demoralizing adjustment in job classifications. Nor was the decision sexually discriminatory in its impact. It benefited all of the incumbent GS-13's—nine men and two women—regardless of their sex and affected all the incumbent GS-12's—seven men and one woman—regardless of sex...."

Similarly, the "red circling" agreed to by respondent Chrysler with respondent Union perpetuated no prior unlawful bias. The use of "red circling" was merely an attempt to "... mitigate the impact of a potentially demoralizing adjustment in job classifications. ..." Nor was the decision to use "red circling" "... sexually discriminatory in its impact. ..." The decision benefited thirteen employees—ten who happened to be men and three who happened to be women—regardless of their sex. The district court properly determined:

> "The Court finds that the 'red-circle' provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. ..."
>
> (Opinion and Order, p. 9 (Petition, pp. 48-49).)

Subsequent to the "red circling" of Mr. Dunn which resulted in a permissible variance between the wages paid petitioner and those paid Mr. Dunn, respondent Chrysler engaged in three sets of collective bargaining negotiations with respondent Union. Under each of the three negotiated collective bargaining agreements, salary structures were agreed upon under which, and as a result of factors other than sex, some variances occurred between the wages paid to employees of one sex and employees of the opposite sex who performed work equal to, or nearly equal to, their counterparts of the opposite sex. Under such salary structures, sometimes female employees who performed such work were paid more than their male counterparts and other times male employees who performed such work were paid more than their female counterparts. In every case, variances in the wages paid were based upon factors other than sex. Each of these three collective bargaining agreements contained sex-neutral salary structures and "lower grade" provisions which protected the wages of employees, both female employees and male employees, from wage reductions in applicable situations. Mr. Dunn

was one of those employees who were so protected. The salary structures in each of the three negotiated collective bargaining agreements thereby preserved permissible variances in the wages paid to female and male employees.

Variances between the wages paid to petitioner and the wages paid to Mr. Dunn occurred as a result of factors other than sex. Initial variances occurred as a result of the use of the accepted principle of "red circling" - a differential based on a factor other than sex. Other variances occurred as a result of the three negotiated collective bargaining agreements. Each of these three collective bargaining agreements was the result of careful negotiations between respondent Chrysler and respondent Union, petitioner's collective bargaining agent. Under each of the three negotiated collective bargaining agreements, salary structures were agreed upon under which, and as a result of factors other than sex, some variances occurred between the wages paid to employees of one sex who performed work equal to, or nearly equal to, their counterparts of the opposite sex. Under such salary structures, the wages paid to employees, both female employees and male employees, were basically determined by classification, grade, and corresponding salary range. Variances between salaries of employees performing the same work are normal and natural occurrences due to the fact that each classification has a substantial salary range through which an employee may advance by automatic progression increases as well as by performance increases. Such increases are the result of factors other than sex. In addition, each of the three negotiated collective bargaining agreements contained "lower grade" provisions which protected the wages of employees, both female and male employees, from wage reductions. The salary structures in each of the three negotiated collective bargaining agreements thereby preserved permissible variations in the wages paid to female and male employees.

Variances in wages which are the result of "... a differential based on any other factor other than sex ..." are permissible under Title VII. The variances between the wages paid to petitioner and the wages paid to Mr. Dunn were the result of such permissible differentials based on factors other than sex. Therefore, based on the authorities cited above, petitioner's action is without merit, and judgment dismissing petitioner's action was properly entered by the district court and was properly affirmed by the Sixth Circuit.

II. NEITHER A DISTRICT COURT NOR AN APPEALS COURT IS REQUIRED TO PRESUME THAT A TITLE VII DEFENDANT ACTS UNLAWFULLY.

Title VII, as previously noted, makes it an unlawful employment practice to discriminate "... *because of* ... sex...." (Emphasis added. 42 *U.S.C.A.* § 2000e-2(a).)

In a Title VII action, a plaintiff has the initial burden of establishing a *prima facie* violation and then the ultimate burden of establishing a violation. Claims of employment discrimination under Title VII may arise in two different ways, either through unlawful disparate treatment or through unlawful disparate impact "... because of ..." an unlawful criterion, here sex. (42 *U.S.C.A.* § 2000e-2(a).) (Generally, see also: *Teamsters v. United States*, 431 U.S. 324 (1977); *Furnco Construction Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *U.S. Postal Svc. Bd. of Governors v. Aikens*, —U.S.— (1983) (31 FEP Cases 609).)

In the instant action, both respondents denied any such unlawful disparate treatment and also any such unlawful disparate impact and then established their absences. Responsively, petitioner failed to establish either unlawful disparate treatment or unlawful disparate impact. Thus, whether petitioner's complaint is viewed in terms of either

the unlawful disparate treatment doctrine or the unlawful disparate impact doctrine, or both, petitioner has not met the required burdens. Assertions alone cannot change either the law or the facts. Similarly, petitioner cannot assume an unlawful intent for either respondent Union or respondent Chrysler. And, petitioner does not deny that female employees have benefited from the "red circle" agreement and also from the "lower grade" provisions of the collective bargaining agreements. Quite simply, there has been no unlawful discrimination ". . . because of . . . sex . . ." as to the petitioner, and petitioner has completely and totally failed to establish otherwise. (42 *U.S.C.A.* § 2000e-2(a).)

Even when, unlike here, a *prima facie* violation by Title VII has been established, a defendant ". . . bears only the burden of explaining clearly the nondiscriminatory reason for its actions. . . ." (*Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 260 (1981).) Here, in the absence of a *prima facie* violation, respondent Union and respondent Chrysler have gone far beyond what was required of them. In addition, respondent Union and respondent Chrysler also established that the differential in wages between petitioner and Mr. Dunn was lawful at all material times. (29 *U.S.C.A.* § 206(d)(1).) The district court properly determined:

> "Therefore, the Court finds that at all times relevant the difference in wages between the plaintiff and Mr. Dunn was due to factors other than sex. . . ."
> (Opinion and Order, p. 10 (Petition, p. 51).)

And, on such basis, the Sixth Circuit properly affirmed. (*Per Curiam* Opinion, p. 2 (Petition, pp. 56-57).)

In view of all of the foregoing, it is not surprising that petitioner has failed to cite a single decision for the novel proposition that a Title VII defendant is presumed to act unlawfully.

III. AFTER A DISTRICT COURT HAS RENDERED AN ERROR-FREE DECISION AGAINST A CLAIMLESS TITLE VII PLAINTIFF AND AN APPEALS COURT HAS CORRECTLY AFFIRMED THAT DECISION, THIS COURT SHOULD NOT BE PERSUADED BY UNSUPPORTED AND UNSUPPORTABLE ARGUMENTS TO PERMIT FURTHER REVIEW.

Since the basic reasons and authorities why respondents were entitled to judgment in the district court have previously been set forth by both that court and the Sixth Circuit and also in this brief and remain unimpaired by the petition, those matters need not again be reiterated. Instead, this section of this brief will be confined to responding to the petition and only to those points which might possibly suggest any desirability of any response at all. So structured, this section of this brief will also not attempt to treat each and every irrelevancy, transparency, and the like in the petition, which, in the absence of a requirement to do so, would only unduly and needlessly burden the Court.

Petitioner has advanced the same arguments which were rejected by both the district court and the Sixth Circuit. Once again, petitioner relies almost exclusively on the readily distinguishable decision of *Hodgson v. Goodyear Tire & Rubber Co.*, 358 F. Supp. 198 (N.D. W.D. Ohio 1973), which was also the principal ineffective prop of petitioner's unsupported and unsupportable arguments before both the district court and the Sixth Circuit. (Petition, p. 17.)

In its opinion and order at pp. 9-10 (Petition, p. 49), the district court accurately and properly concluded:

> "... The plaintiff's reliance on *Hodgson v. Goodyear Tire and Rubber Co.*, 358 F. Supp. 198 (N.D. Ohio 1973), is misplaced. In that case the checkers were classified based on sex in accordance with Ohio statutes then in effect. The court in *Hodgson* disallowed continuation of the pay disparity after the jobs became equal *because the original disparity had been based on*

sex. In this case, the original pay disparity was *not* based on sex."

(Emphasis added.)

The Sixth Circuit appropriately and properly affirmed.

In *Hodgson v. Goodyear Tire and Rubber Co.*, 358 F. Supp. 198 (N.D. W.D. Ohio 1973), the "red circling" perpetuated disparate wage rates with respect to workers of different sexes performing essentially the same work. Such wage rates initially had been determined solely on the basis of the sex of the worker. In the instant action, however, petitioner has not shown, nor even averred, that the disparate wage rates paid to petitioner and to Mr. Dunn prior to the 1974 collective bargaining negotiations for the first collective bargaining agreement between respondent Union and respondent Chrysler were determined solely on the basis of sex. In fact, it is undisputed that the initial disparity in wage rates between petitioner and Mr. Dunn was based upon the fact that petitioner and Mr. Dunn were performing different duties.

The evidence submitted is clear that petitioner and Mr. Dunn were performing different duties at least until 1974 or 1975. In her deposition, petitioner stated that she and Mr. Dunn were performing different work until 1974 or 1975. Petitioner's testimony makes it clear that she was doing "... color matching ..." and that Mr. Dunn was "... on the drawing board. ..." (Opinion and Order, p. 8 (Petition, p. 44).) In short, petitioner and Mr. Dunn were performing different duties which resulted in the initial disparity in their respective wage rates.

It is uncontroverted that the initial disparity in wages rates paid to petitioner and Mr. Dunn was made pursuant to "... a differential based on any other factor other than sex. ..." The "red circling" of Mr. Dunn in 1974, when the first collective bargaining agreement was entered into between respondent Chrysler and respondent Union, was pursuant to a policy which was sex-neutral. The "red

circling" perpetuated no prior unlawful bias. The use of "red circling" was merely an attempt to "... mitigate the impact of a potentially demoralizing adjustment in job classifications. ..." Nor was the decision to use "red circling" "... sexually discriminatory in its impact. ..." Thirteen employees, including Mr. Dunn, were "red circled". Of those thirteen employees, ten happened to be men and three happened to be women. Therefore, the district court quite properly concluded that:

> "... [T]he 'red-circle' provision in this case is a valid sex-neutral resolution of the pay disparity which Chrysler and the Union faced when they negotiated the collective bargaining agreement. ..."
> (Opinion and Order, p. 9 (Petition, pp. 48-49).)

Subsequent to the "red circling" of Mr. Dunn which resulted in a permissible variance between the wages paid petitioner and those paid Mr. Dunn, three collective bargaining agreements were negotiated between respondent Chrysler and respondent Union, petitioner's collective bargaining agent. These three collective bargaining agreements merely preserved permissible variations in wages paid to petitioner and Mr. Dunn, variations which were the result of permissible differentials based on factors other than sex. Since initial variances between the wages paid to petitioner and Mr. Dunn were not the result of sex bias, these variances did not become proscribed simply because they were recognized by the sex-neutral, "lower grade" provisions designed to protect employees, both male employees and female employees, from wage reductions, contained in the three negotiated collective bargaining agreements.

Petitioner also cites, among other meaningless citations here, some additional decisions in which courts have also used the "red circle" principle to remedy discrimination. (Petition, pp. 17-18.) Other than further demonstrating that the "red circle" principle has been applied in a wide variety of situations, such decisions are inapplicable here.

In the same vein, the petition, at p. 10, also cites 29 *C.F.R.* § 800.146, "Examples—'red circle' rates, in general", but said section itself broadly states that "...'red circle' rates ...[can be] maintained *for many reasons.* ..." (Emphasis added.)

In the face of all of the foregoing, petitioner still attempts to argue that this defense ("... any other factor other than sex ...") should be given an extremely narrow and extremely unrealistic definition, perhaps even limited to "age or illness". (Petition, pp. 17, 19.) The argument is made despite, and as demonstrated above, the statute's expressly and intentionally broad language ("... any other factor other than sex ..."), the legislative history ("... the broad general exclusion has also been included ..." and the use of "red circle" rates is recognized "... for many valid reasons ..."), the regulations (the use of "red circle" rates is appropriate "... for many reasons ..."), and numerous decisions ("... the flexibility of the concept [of 'red circling'] has been preserved by anticipation of the particular needs that may arise ...").

Indeed, in this very action, the district court has properly determined that "... congressional history supports 'red-circling' as a valid defense ... [and] the United States Department of Labor ... has approved the principle of 'red-circling'..." and "the principle of 'red circling' has also been recognized ... as a permissible factor other than sex ...", and the Sixth Circuit has stated that "...'red circle rates' ... are maintained for many valid reasons. ..." (Opinion and Order, pp. 6, 7 (Petition, pp. 38, 39, 41); *Per Curiam* Opinion, p. 2 (Petition, p. 55).) The petitioner, while purporting to fail to recognize either the necessity for, or the validity of, "red circle" and "lower grade" provisions, claims only to be seeking judicial review by this Court for "guidance" and "clarification." (Petition, pp. 17, 21.) In actuality, petitioner, contrary to all of the above, is now requesting this Court to re-write the statute, its legislative

history, and more, because she lost before both the district court and the Sixth Circuit. Such legislating is inappropriate for any court, even if it were so inclined.

In addition, such a re-writing should not be undertaken by this Court. It is for many valid business and operational reasons that "red circling" and "lower grade" provisions are widely used throughout industry by employers and unions. If they were not so used, employees, both female and male, and also employers would be penalized for their lack of use. Here, too, "red circling" and "lower grade" provisions have been properly used by respondent Union and respondent Chrysler. Indeed, it is also undenied by petitioner that the "red circling" and "lower grade" provisions involved here have benefited both female employees and male employees. In effect, what petitioner is really complaining about is that, since she has not personally benefited by the "red circling" and "lower grade" provisions involved here, she does not like them and is demanding that they be declared unlawful under Title VII. As previously demonstrated herein, it takes far more to establish a violation of Title VII. Moreover, as a unanimous Supreme Court stated in *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 259 (1981):

> "... Title VII ... does not demand that an employer give preferential treatment to minorities or women. ... The statute was not intended to 'diminish traditional management prerogatives.'..."

(See also: *California Brewers Assn. v. Bryant*, 444 U.S. 598, 608 (1980), *reh. denied*, 445 U.S. 973 (1980), where this Court stated that "... it does not behoove a court to second-guess either that [collective bargaining] process or its products ..."; *American Tobacco Co. v. Patterson*, 456 U.S. 63, 77 (1982), where this Court stated that national labor policy favored "... minimal governmental intervention in collective bargaining....")

When, as here, the district court has rendered an error-free decision against a claimless Title VII plaintiff and the appeals court has correctly affirmed that decision, this Court should not be persuaded by unsupported and unsupportable arguments to permit review of those decisions. Under these circumstances, further review is neither warranted nor appropriate, and it should be declined.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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December 6, 1984

CERTIFICATE OF SERVICE

Three copies of the foregoing brief have been mailed first-class postage prepaid this 6th day of December, 1984, to Dennis E. Murray, Esq., an attorney for petitioner herein, at his office at Murray & Murray Co., L.P.A., 300 Central Avenue, Sandusky, Ohio 44870, and also to Joan Torzewski, Esq., an attorney for respondent Union herein, at her office at Lackey, Nusbaum, Harris, Reny & Torzewski, 330 Spitzer Building, Toledo, Ohio 43604.

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